MOTION FILED

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No. 75-260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

L. N. McDONALD AND RAYMOND L. LAIRD,
Petitioners,

v.

SANTA FE TRANSPORTATION COMPANY AND TEAMSTERS FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION No. 988,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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EMPLOYEES, LOCAL UNION No. 988,
Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (hereinafter "AFL-CIO") hereby moves for leave to file the attached brief as *amicus curiae* in support of the position of the petitioners in the above captioned case.

The AFL-CIO is a federation of 110 national and international unions having a total membership of 14 million working men and women of all races, creeds and colors. From its inception, AFL-CIO has championed the elimination of all vestiges of racial discrimination from American life. It has endeavored to further this goal through the rule of law, and because of its commitment has sought no exemptions for unions from the sweep of federal statutes addressed to that end. Thus, as AFL-CIO President George Meany stated, when testifying in support of the passage of

Title VII of the Civil Rights Act of 1964:

> "The leadership of the AFL-CIO, and of the separate federations before merger, has been working ceaselessly to eliminate those prejudices. The leaders of every affiliated national and international union are enlisted in the same effort. We have come a long way in the last 20 years—a long way farther, I might say, than any comparable organization, including the religious organizations as a whole, and certainly we are a generation or more ahead of the employers as a whole.
>
> "But we have said repeatedly that to finish the job we need the help of the U.S. Government. * * * When the rank-and-file membership of a local union obstinately exercises its right to be wrong, there is very little we in the leadership can do about it, unaided. * * *
>
> "In short, I am not here to ask for special exemptions for unions; quite the contrary. I hope the law you draft will cover the whole range we ourselves have written into our constitution * * *."*

See also the Brief in which the AFL-CIO joined this Term in *Franks* v. *Bowman Transportation Co.*, No. 74-728, argued November 3, 1975.

The decision below is troubling to the AFL-CIO and its affiliates in two respects: (1) it declares that a federal law—42 U.S.C. § 1981—extends protections against racial discrimination to members of one race but not members of another; and (2) it holds that the victims of racial discrimination in employment may not invoke the protections

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* EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, pp. 2158-59.

of another federal law, Title VII, if they have engaged in conduct amounting to a crime under State law.

The Federation believes that the two conclusions reached below are wrong as a matter of statutory interpretation; but more, that they are unfortunate impediments to the national interest in eradicating racial discrimination. The first is inconsistent with the basic precept of "equal justice under law" which in our variegated society must be the touchstone of all legislation designed to cure discrimination. The second cuts into the protection against actions motivated by racial discrimination which Congress intended to furnish in enacting Title VII.

With respect to the first of the issues presented herein—whether 42 U.S.C. § 1981 protects whites against racial discrimination—the Federation believes that its extensive research into the legislative history of the statute may be of assistance to the Court. Although the petition refers to portions of that history, we have tendered in the attached brief a more complete recitation of the materials disclosing that Congress intended in § 1981 to afford protection against racial discrimination to whites as well as blacks.

With respect to the second issue presented—the availability of Title VII protections to employees who have committed acts of misconduct against their employer amounting to crimes under State law—the court below purported to find support for its holding in decisions under the National Labor Relations Act. In the attached brief, we have drawn upon our extensive experience under the NLRA to show that, quite the contrary to what the court below believed, the NLRA cases support petitioners' position.

WHEREFORE, AFL-CIO respectfully prays that this motion be granted, and that the attached brief be filed.

Respectfully submitted,

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L. N. McDonald and Raymond L. Laird,
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v.
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Employees, Local Union No. 988,
Respondents.

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (hereinafter "AFL-CIO") files this brief contingent upon the granting of the foregoing motion.

SUMMARY OF ARGUMENT

I

The legislative history makes unmistakably clear that Congress intended 42 U.S.C. § 1981, which forbids racial discrimination with respect to certain enumerated matters, to protect whites as well as blacks against such discrimination. That history is detailed at pp. 8-18 *infra*.

II

Title VII indisputably protects whites as well as blacks against racial discrimination. The court below, however,

held that employees of any race who engage in criminal conduct against their employer may not challenge the employer's discipline as violative of Title VII. That holding contravenes well-established principles.

An employer of course may discipline his employees *for misconduct*. But he cannot seize upon that misconduct as a pretext for imposing discipline for illegal reasons such as race. Disparate treatment is powerful evidence of illegal motivation, for the employer has shown by his more lenient treatment of others that his business interests do not dictate the harsher treatment. These principles, which this Court fully embraced in *McDonell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), have also been applied for decades under the National Labor Relations Act, which Congress used as a model in drafting Title VII. The principles are as applicable to misconduct which is "criminal" as to any other misconduct. State law may intervene to punish crimes, but the principles established by federal law do not bend out of shape simply because conduct is a State law crime. Petitioners have stated a claim of violation of Title VII.

ARGUMENT

I. THE SECTION 1981 CLAIM

Petitioners, two white employees, were fired for misappropriating their employer's property. A black employee who participated with them in the theft was not fired. The petitioners contend that the black employee was equally culpable, that the employer imposed heavier discipline on them because of their race, and accordingly that their rights under 42 U.S.C. § 1981 were violated.

For petitioner's allegations to state a claim under § 1981, two legal propositions must be resolved in their favor:

(1) That such protections against racial discrimination as § 1981 affords extend to whites as well as blacks; and

(2) That § 1981's guarantee of equal rights to "make and enforce contracts" is transgressed by an employer's imposition of disparate discipline, because of race, upon equally culpable employees.

The court below ruled against petitioners on the first proposition, and never addressed the second. As we show in Part A, the court was wrong on the issue it decided: § 1981 protects whites equally with blacks. Then, in Part B, we suggest that this Court not decide the second proposition now, but rather leave it for initial consideration below.

A. Such Protections Against Racial Discrimination As 42 U.S.C. § 1981 Affords Extend To Whites As Well As Blacks

42 U.S.C. § 1981, a portion of Section 1 of the Civil Rights Act of 1866,[1] provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The court below held that this statute forbids discrimination against blacks because of their race, but not discrimination against whites because of *their* race. That was

[1] The other portion is codified as 42 U.S.C. § 1982.

its reading of the words "all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." But a statutory direction that blacks shall have "the same right" as whites can just as reasonably be understood to preclude according preferential rights to blacks. Moreover, § 1981 does not stop with the above-quoted language, but adds that "all persons . . . shall be subject to like punishment, pains, penalties, . . . and exactions of every kind." Thus, in its entirety, the language of the statute suggests that Congress intended to forbid racial discrimination against whites as well as against blacks. And the legislative history confirms that this is so.[2]

The bill which eventuated in the Civil Rights Act of 1866 was reported out by the Senate Judiciary Committee on January 12, 1866, a few days after the Thirteenth Amendment had been adopted. The bill's title when introduced—and the title which it retained upon enactment—was "An act to protect all persons in the United States in

[2] The petitioners have cast the question before this Court as one of standing: "Whether white employees . . . have standing to sue under the Civil Rights Act of 1866, 42 U.S.C. § 1981." Petition, p. 2. We believe the question is rather one of the substantive meaning of the statute. If § 1981 prohibits racial discrimination against whites, petitioners of course have standing to assert that their rights under the statue have been violated. If, on the other hand, § 1981 forbids only racial discrimination against blacks, petitioners have failed to state a claim of violation. This is not a case in which whites seek to predicate a claim upon alleged racial discrimination against blacks—the context in which standing becomes the critical question. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209, n. 8 (1972).

their civil rights and furnish the means of their vindication."[3]

As introduced, Section 1 of the bill declared that "the inhabitants of every race or color . . . shall have the same right to make and enforce contracts, . . . and shall be subject to like punishment, pains, and penalties, and to none other . . ."[4] It did not contain the additional phrase "as is enjoyed by white citizens."

Senator Trumbull, the Chairman of the Judiciary Committee, was the principal spokesman for the bill. When Senator Davis, an opponent of the bill, suggested that the bill was unfair to whites, Senator Trumbull issued an impassioned refutation.

> "He [Senator Davis] denounces this bill as 'outrageous,' 'most monstrous,' 'abominable,' 'oppressive,'

[3] 71 Cong. Globe (39th Congress, 1st Session) 211 (remarks of Senator Trumbull); 72 Cong. Globe 1861 (remarks of the Speaker).

[4] The full text of Section 1, as introduced, was:

> "There shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." 71 Cong. Globe 474; see also *id.* at 211.

'iniquitous,' 'unconstitutional,' and 'void.'

"Now, what is this bill that is obnoxious to such terrible epithets? *It is a bill providing that all people shall have equal rights.* Is not that abominable? Is not that iniquitous? Is not that most monstrous? Is not that terrible on white men? [Laughter.] When was such legislation as this ever thought of for white men?

"*Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights*, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these *a bill, the only object of which is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man? With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very object of the bill is to break down all discrimination between black men and white men?*"[5]

On February 2, 1866, the Senate passed the bill without

[5] 71 Cong. Globe 599 (remarks of Senator Trumbull) (emphasis added). Opponents, too, understood that the bill protected whites. *Id.* at 500, 603 (remarks of Senator Cowan); *Id.* at 505 (remarks of Senator Johnson). Even Senator Davis, whose contrary understanding had provoked Senator Trumbull's refutation, later indicated his recognition that pursuant to the bill "all the people of every State, black and white, shall have the same civil rights *eo nomine*." 72 Cong. Globe 1415 (remarks of Senator Davis).

material change.[6] The bill then went to the House,[7] and on March 1, 1866, the debate on the bill commenced on the floor of the House. Representative Wilson, the Chairman of the House Judiciary Committee and the floor manager of the bill, explained that his Committee proposed that the bill be amended by changing the word "inhabitants" to "citizens":

> "This amendment is intended to confine the operation of this bill to citizens of the United States, instead of extending it to the inhabitants of the several States, as there seems to be some doubt concerning the power of Congress to extend this protection to such inhabitants as are not citizens."[8]

Representative Wilson then offered "the following amendment, not as coming from the committee, but because it is necessary to perfect the amendment already offered":

> "Insert after the word 'property' in line fifteen of the first section, the words 'as is enjoyed by white citizens'; so that the clause will read: shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, as is enjoyed by white citizens."[9]

Representative Wilson's description of the bill's purpose, which followed immediately after he proposed this change, makes clear that he did not intend by adding these words

[6] 71 Cong. Globe 606-607.

[7] 71 Cong. Globe 646.

[8] 72 Cong. Globe (39th Congress, 1st Session) 1115 (remarks of Rep. Wilson).

[9] *Ibid.*

to remove the bill's prohibition of racial discrimination against whites:

> "It provides for the equality of citizens of the United States in the enjoyment of 'civil rights and immunities' . . .
>
> ". . . [C]ivil rights are the natural rights of man: and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic.
>
> ". . . *Whatever exemptions there may be shall apply to all citizens alike. One race shall not be more favored in this respect than another. One class shall not be required to support alone the burdens which should rest on all classes alike. That is the spirit and scope of the bill, and it goes not one step beyond.*" [10]

He added that if all citizens were of one race there would be no need for the bill:

> "But such is not the case, and we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." [11]

Representative Shellabarger, a supporter, answered charges that the bill invaded States' rights. He explained that Section 1:

> "neither confers nor defines nor regulates any right whatever. Its whole effect is not to confer or regulate rights, but to require that whatever of the enumerated rights and obligations are imposed by State laws shall

[10] 72 Cong. Globe 1117 (remarks of Rep. Wilson) (emphasis added).

[11] 72 Cong. Globe 1118 (remarks of Rep. Wilson).

> be for and upon all citizens alike without distinctions based on race or former condition in slavery.
>
> ". . . Its whole effect is to require that whatever rights as to each of these civil . . . matters the States may confer upon one race or color of the citizens *shall be held by all races in equality*. Your State may deprive women of the right to sue or contract or testify, and children from doing the same. *But if you do so, or do not do so as to one race, you shall treat the other likewise.*" [12]

The bill was passed by the House,[13] and was returned to the Senate. Because of the amendments which the House had made,[14] the bill was referred to the Senate Judiciary Committee for consideration.[15] On the following day, the Senate Committee unanimously recommended concurrence in the House amendments.[16]

[12] 72 Cong. Globe 1293 (remarks of Rep. Shellabarger) (emphasis added). Other supporters expressed like views. *Id.* at 1124 (remarks of Rep. Cook); at 1159 (remarks of Rep. Windom). None expressed a contrary view.

[13] 72 Cong. Globe 1367.

[14] In addition to the amendments discussed heretofore, the House amended the bill in one other important respect. As explained in *Georgia* v. *Rachel*, 384 U.S. 780, 791-792 (1966), the Senate bill had contained "a general provision forbidding 'discrimination in civil rights or immunities,' preceding the specific enumeration of rights to be included in § 1. Objections were raised in the legislative debates to the breadth of the rights of racial equality that might be encompassed by a prohibition so general as one against 'discrimination in civil rights or immunities.' There was sharp controversy in the Senate, but the bill passed. After similar controversy in the House, however, an amendment was accepted striking the phrase from the bill."

[15] 72 Cong. Globe 1365.

[16] 72 Cong. Globe 1376.

The House's addition of the words "as is enjoyed by white citizens" sparked the following exchange on the Senate floor:

> "MR. VAN WINKLE: There seems to be an incongruity in this language. . . . The clause commences with the words 'and such citizens.' As I understand those words they include all persons who are or can be citizens, white persons and all others. The clause then goes on to provide that 'such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have the same right to make and enforce contracts,' &c., 'as is enjoyed by white citizens.' It seems to me these words are superfluous. The idea is that the rights of all persons shall be equal; and I think the clause, leaving out these words, would attain the object. This is merely a verbal criticism. I think the bill is incongruous in expression as it stands.
>
> "MR. TRUMBULL: I quite agree with the Senator from West Virginia that these words are superfluous. I do not think they alter the bill. I think the bill would be better without them, but they have been adopted by the House of Representatives. We did not think they altered the meaning of the bill; and we did not think it worthwhile to send the bill back just because these words were inserted by the House. They thought there was some importance in them and have inserted them; and as in the opinion of the committee which examined this matter they did not alter the meaning of the bill, the committee thought proper to recommend a concurrence, and I hope the Senate will concur in it.
>
> "MR. VAN WINKLE: It is a mere verbal correction that I suggested, and I am not at all strenuous about it. . . ."[17]

[17] 72 Cong. Globe 1413.

The Senate approved the bill with the House amendments,[18] and the bill was referred to the President.

President Johnson vetoed the bill. He stated that "a perfect equality of the white and black races is attempted to be fixed by Federal law"; that as to the matters enumerated in the bill no State could "ever exercise any power of discrimination between the different races"; that Congress was seeking to "abrogate all State laws of discrimination between the two races in the matter of real estate, of suits, and of contracts generally"; and that Congress was seeking to "repeal all State laws discriminating between whites and blacks in the subjects covered by this bill."[19]

When the Senate took up reconsideration of the bill following the veto, Senator Trumbull confirmed the accuracy of the President's reading:

> "The bill neither confers nor abridges the rights of anyone, but simply declares that in civil rights there shall be an equality among all classes of citizens and that all alike shall be subject to the same punishment . . . Each state . . . may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial."[20]

The Senate voted to override the veto, and the bill was referred to the House.[21] In the House the principal speech urging that the veto be overridden was delivered by Representative Lawrence, and it included the following observations:

[18] 72 Cong. Globe 1422.

[19] 72 Cong. Globe 1679-80 (veto message of President Johnson).

[20] 72 Cong. Globe 1760 (remarks of Senator Trumbull).

[21] 72 Cong. Globe 1809.

"[The bill] does not confer any civil right, but so far as there is any power in the States to limit, enlarge, or declare civil rights, all these are left to the States.

"But it does provide that as to certain enumerated civil rights every citizen 'shall have the same right in every State and Territory.' That is *whatever of certain civil rights may be enjoyed by any shall be shared by all citizens in each State, and in the Territories*, and these are:

"1. To make and enforce contracts.

"2. To sue, to be sued, and to be parties.

"3. To give evidence.

"4. To inherit, purchase, lease, sell, hold and convey real and personal property.

"5. To be entitled to full and equal benefit of all laws and proceedings for the security of person and property." . . .

. . . .

> "*This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any class or creed, or race or color, but in the great future that awaits us will, if it become a law, protect every citizen. . . .*"[22]

In an eloquent closing, Representative Lawrence declared:

> "Mr. Speaker, this Nation must settle the question whether among her own citizens there may be a discrimination in the enjoyment of civil rights . . . If States may deny to any class of our citizens the right to make contracts, to own a homestead; may strip men of all that is valuable in life; if we shall sanctify this

[22] 72 Cong. Globe 1832, 1833 (remarks of Rep. Lawrence) (emphasis added).

> as the mission of the American Government, *some friendless class or race may suffer today, but as sure as retributive justice exists the terrible wrong will sooner or later 'return to plague the inventors,' and we who have 'sown the wind' may 'reap the whirlwind.'*
>
> "But if we shall [vindicate the Constitution by enacting this bill] then may we hope that the men of today and of all times will enjoy its benefits and blessings forever."[23]

On April 9, 1866, the House joined the Senate in overriding the veto, and the bill became law.[24]

Soon thereafter, in part because some Congressmen were concerned that the Thirteenth Amendment might be held to have been insufficient authority for enactment of the Civil Rights Act of 1866, Congress proposed the Fourteenth Amendment.[25] In 1870, following the ratification of the latter Amendment, Congress re-enacted the provisions of Section 1 of the 1866 Act,[26] changing the words "such citizens of every race or color" to "all persons within the jurisdiction of the United States" in order to extend the Act's protections to aliens.[27] Subsequent codifications of

[23] 72 Cong. Globe 1837 (remarks of Rep. Lawrence) (emphasis added).

[24] 72 Cong. Globe 1861.

[25] *Hurd* v. *Hodge*, 334 U.S. 24, 32-33 (1948).

[26] Sections 16 and 18 of the Act of May 31, 1870, c. 144, §§ 16, 18, 16 Stat. 140, 144.

[27] The legislative history of this extension is described in *Guerra* v. *Manchester Terminal Corp.*, 350 F. Supp. 529, 533-536 (S.D. Tex. 1972), affirmed on this issue, 498 F.2d 641, 653-654 (5th Cir. 1974). See also *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, 419-420 (1948).

the 1866 Act have split Section 1 into two parts, now appearing as 42 U.S.C. §§ 1981, 1982.[28]

The foregoing legislative history shows beyond question that Congress intended Section 1 of the 1866 Act to apply to racial discrimination against whites, as well as against blacks, and the court below erred in declaring otherwise.[29]

[28] See, previously, Revised Statutes of 1874, §§ 1977, 1978.

[29] The question of Congress' constitutional authority to protect whites against private employment discrimination has been little discussed in the cases. Congress did not purport to be acting under the commerce clause when it enacted § 1981, and this Court did not, in *Jones* v. *Mayer Co.*, 392 U.S. 409 (1968), suggest that the 1866 Act's application to private discrimination was confined to instances of involvement of interstate commerce. Assuming that § 1981 reaches private employment discrimination (see pp. 19-20, n.30, *infra*), two other constitutional predicates are available for its protection of whites:

(1) The Congress which enacted the 1866 Act thought that the enabling clause of the Thirteenth Amendment authorized it to protect persons of all races against racial discrimination regarding fundamental rights: any such racial discrimination was a "badge or incident of slavery." See, e.g., 71 Cong. Globe 474 (remarks of Senator Trumbull); 72 Cong. Globe 118 (remarks of Representative Wilson); *Id.* at 1124 (remarks of Senator Cook); *Id.* at 1159 (remarks of Representative Windom). See also *Walker* v. *Pointer*, 304 F. Supp. 56, 58 (N.D. Tex. 1969).

(2) In any event, as the Thirteenth Amendment at least authorized Congress to protect *blacks* against private racial discrimination, *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 437-444, Congress' authority to assure that an enactment to that effect did not result in preferential treatment of blacks may be seen as "a power ancillary to the enabling clause of the Thirteenth Amendment." *WRM.A Broadcasting Co.* v. *Hawthorne*, 365 F. Supp. 577, 581 (M.D. Ala. 1973) (Johnson, J.). Cf. *Houston, E.&W.T.R. Co.* v. *United States*, 234 U.S. 342 (1914).

(Footnote continued on next page.)

B. This Court Should Not Reach or Decide the Question Whether the Particular Act of Racial Discrimination Alleged Here Would, if Proved, Constitute a Violation of § 1981

We have shown that whatever protections against racial discrimination are afforded to blacks by 42 U.S.C. § 1981 are afforded to whites as well. A holding to that effect is sufficient to dispose of the lone § 1981 issue addressed by the courts below, and would warrant a remand of this case for further proceedings consistent with that holding. We respectfully urge that this Court not take the further step of deciding whether the particular act of racial discrimination alleged here—the imposition of disparate discipline, because of race, upon equally culpable employees—would, if proved, constitute a violation of § 1981.[30]

Indeed, had Congress not extended § 1981's protection to whites it might have run afoul of the Fifth Amendment, by forbidding discrimination against one race while countenancing it against the other. The instant case highlights the constitutional issue. The petitioners here alleged that white and black employees had "equal complicity" in a jointly-perpetrated theft, and that the employer meted out disparate discipline solely because of their race. Could Congress, consistently with the Fifth Amendment, forbid the employer's visiting the heavier discipline upon the black because of his race, while leaving the employer free to visit the heavier discipline upon the whites because of *their* race?

[30] This Court has declared that § 1981's provision relating to "racial discrimination in the making and enforcement of contracts" affords "a federal remedy against discrimination in private employment on the basis of race." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459-460 (1975). No party in *Johnson* questioned the applicability of § 1981 to private employment discrimination (cf. *Bob Jones University* v. *Simon*, 416 U.S. 725, 740 n. 11 (1974)), and no party in the instant case has asked the Court to reconsider the correctness of *Johnson*. Accordingly, our discussion in the text

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This Court observed in *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 413, that § 1982 is "not a comprehensive open housing law," and in that respect has a more limited substantive scope than the recently-enacted civil rights laws regulating housing discrimination. In like manner, § 1981 is not a comprehensive fair employment law. Unlike Title VII of the Civil Rights Act of 1964, which devotes hundreds of words to defining what is and is not discriminatory employment conduct, § 1981 merely prohibits racial discrimination with respect to the "right . . . to make and enforce contracts." Moreover, as noted above (p. 13, n. 14), the Congress which enacted the 1866 Act rejected a comprehensive anti-discrimination clause in favor of one confined to specifically enumerated subjects, thus suggesting caution in defining § 1981's sweep.

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assumes *Johnson's* continued viability. In other pending cases, however, this Court has been asked to reconsider the correctness of its seminal holding in *Jones* v. *Mayer Co.*—from which *Johnson* flowed—that Section 1 of the Civil Rights Act of 1866 applies to private discrimination. *Runyon* v. *McCrary*, No. 75-62, cert. gr. 44 L.W. 3279 (1975) (Petition, pp. 6-9); see also *Fairfax-Brewster School, Inc.* v. *Gonzales*, No. 75-66, cert. gr. 44 L.W. 3279 (1975) (Petition, pp. 7-9). The correctness of *Jones* v. *Mayer Co.* has been much debated. See, e.g., *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 241 (1969) (dissenting opinion of Mr. Justice Harlan, joined by the Chief Justice and Mr. Justice White); *McCrary* v. *Runyon*, 515 F.2d 1082, 1086-87 (4th Cir. 1975) (*en banc*). As the issue is before the Court pursuant to the grant of certiorari in *Runyon* v. *McCrary*, and so that no implication may be drawn from our silence, we are constrained to observe that a reading of the legislative history of the 1866 Act in its entirety, which we undertook in preparation of this brief and of the brief we joined in *Franks* v. *Bowman Tpn. Co.*, No. 74-728, has left us with an indelible impression that the Congress of 1866 *thought* its bill applied only to State action.

The content to be imparted to the words "make and enforce contracts" has been little explored by the lower courts, and has not been addressed by any court in the context of the particular behavior alleged here: disparate discipline. It is one thing to hold that an employer who discriminatorily refuses to hire the members of a particular race has violated § 1981: by his conduct he has engaged in racial discrimination in the making of employment contracts. It is quite another to say that every discriminatory action taken by an employer against his employees constitutes invasion of the "equal right" to "make and enforce contracts". Compare the widely divergent interpretations of that phrase in the majority and dissenting opinions in *McCrary* v. *Runyon*, 515 F.2d 1082 (4th Cir. 1975) (*en banc*), cert. gr. 44 L.W. 3279 (1975).[31]

The substantive scope of § 1981 has not been considered by either of the lower courts in the instant case, was not discussed by the parties in the petition and briefs in opposition, and quite likely will not be addressed in the briefs on the merits. In these circumstances, we respectfully suggest that the matter be left for initial exploration by the courts below.[32]

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[31] See also the cross-petition for certiorari in *United Order of American Bricklayers* v. *Waters*, No. 74-1350, pp. 2, 17.

[32] There is an additional consideration which may arise in some § 1981 employment cases, albeit not in this one. In enacting Title VII of the 1964 Act, Congress determined that there were some practices which, although arguably discriminatory, should not be invalidated by Title VII. Section 703 (e)-(j), 42 U.S.C. § 2000e-2 (e)-(j). There may conceivably develop instances where conduct specifically protected in Title VII is said to violate § 1981. The question of the interrelationship of the two laws would then be posed. As Congress focused specifically on private employment

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II. THE TITLE VII CLAIM

Title VII of the Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a), provides:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) To fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. . . ."

No party herein disputes that this provision forbids racial discrimination against whites as well as against blacks. "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). The legislative history of Title VII clearly evidences Congress' intention to forbid racial discrimination against whites.[33]

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discrimination in shaping the 1964 Act, but did not do so at all when considering the 1866 Act, there are substantial arguments for harmonizing the substantive reach of the two statutes in such instances. Comment, *Racial Discrimination in Employment under the Civil Rights Act of 1866*, 36 U. Chi. L. Rev. 615, 632-633 (1969). See also *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1320, n. 4 (7th Cir. 1974), pets. for cert. pending, Nos. 74-1064, 74-1350. Cf. *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 249-253 (1970). This Court has recognized that a similar question exists with respect to the interrelationship between § 1982 and Title II of the 1964 Act. *Tillman* v. *Wheaton-Haven Recreation Association*, 410 U.S. 431, 438-439 (1973).

[33] The floor managers of Title VII in the Senate, Senators Clark and Case, introduced a series of materials designed to constitute a definitive interpretation of Title VII. One of these materials was a

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In the instant case, petitioners allege that for reasons of race their employer has imposed more severe discipline upon them than upon an equally-culpable black co-employee for a jointly perpetrated theft against the employer. The court below ruled that petitioners did not state a claim of violation of Title VII: having admitted the commission of a criminal act against their employer, the court below rea-

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series of "objections" and "answers". Among the "objections" was the following:

> "Objection: Many employers will lean over backwards to avoid discrimination, and as a result will discriminate against other employees. . . .
>
> "Answer: . . . [T]he Commission has a clear mandate to engage in widespread educational and promotional activities to encourage understanding and acceptance of the policy of the Act, including the obligation not to discriminate against whites." EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964 (hereinafter "Leg. Hist.") 3014-15.

Yet another of the "objections" was as follows:

> "Objection: The bill would require employers to establish quotas for non-whites in proportion to the percentage of non-whites in the labor market area.
>
> "Answer: Quotas are themselves discriminatory" (Leg. Hist. 3015).

Another of the legislative materials introduced was an interpretative memorandum prepared by Senators Clark and Case. Insofar as relevant here, the memorandum stated:

> "There is no requirement in Title VII that an employer maintain a balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race". (Leg. Hist. 3040).

The memorandum also stated that employers would "not be obliged —*or indeed, permitted*—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are

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soned, Title VII afforded them no protection against the consequences. This holding is wrong.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973), this Court recognized the self-evident proposition that an employee's race or color cannot insulate him from the ordinary consequences of misconduct:

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hired, to give them special seniority rights at the expense of the white workers hired earlier" *ibid.* (emphasis added).

Yet another of the materials introduced by Senators Clark and Case was a Department of Justice memorandum responding to certain objections which had been raised by Senator Hill. Explaining that Title VII does not require racial quotas, this memorandum added:

> "On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of Title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What Title VII seeks to accomplish, what the Civil Rights Bill seeks to accomplish is equal treatment for all." (Leg. Hist. 3245)

Senator Williams, one of the leading supporters of the bill, explained during the debates that "to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by Title VII of this bill." (Leg. Hist. 3189). Indeed, precisely because discrimination against whites was encompassed by Title VII, Congress became intrigued with the question whether the Harlem Globetrotters could retain their identity as an all-black team. (Leg. Hist. 3013-14, 3191.) The conclusion was that they could, because they did not employ enough people to be covered by Title VII (Leg. Hist. 3013-14). In like manner, questions were raised as to the motion picture industry's ability to depict black characters without discriminating in employment (Leg. Hist. 3013-14). The conclusion was that they could insist upon employees who resembled the characters they wished to be portrayed, but could not limit hiring by race (i.e., they could hire persons who "looked" black, but could not insist that they *be* black) (*ibid*).

> "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate, unlawful activity against it."

The court below cited *McDonnell Douglas* as supporting its conclusion, apparently deeming the foregoing statement dispositive. Manifestly, that court did not read far enough, for in *McDonnell Douglas*, Mr. Justice Powell went on to declare:

> "[B]ut the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext." *Id.* at 804. In other words, an employer is free to fire employees for engaging in unlawful conduct, and if that is indeed its reason it has not violated Title VII. But the existence of valid grounds for discharge will not legitimatize a discharge actually predicated upon race.

Of particular relevance here, in *McDonnell Douglas* this Court recognized that disparate treatment is powerful evidence that an employment decision has been impermissibly tainted by racial motivation:

> "Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." *Id.* at 804.

The court below purported to find support for its contrary holding in decisions under the National Labor Relations Act. Reference to the NLRA is, of course, appropriate, for it too is an anti-discrimination statute, and Congress used it as a model in drafting Title VII. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419-420 and n. 11 (1975). Indeed, in *McDonnell Douglas*, 411 U.S. at 803-804, this Court found "pertinent" the holding in *Labor Board* v. *Fansteel Corp.*, 306 U.S. 240, 255 (1939), that wrongdoers are not insulated from discharge *for their wrongs*. But the court below erred in failing to perceive that under the NLRA, as under Title VII, that is not the end of the inquiry.

Section 8(a)(3) of the NLRA forbids discrimination on the basis of union allegiance or non-allegiance. As *Fansteel* recognized, this provision does not insulate a union adherent from discipline for acts of misconduct. But conversely, an employee's misconduct will not legitimatize discipline which in fact was imposed because of the employee's union allegiance. And the strongest evidence of improper motivation is that other employees, who are not union adherents, were treated less harshly for the same offense. In that circumstance, the employer cannot contend that the discipline of the union adherent was necessary to achieve legitimate business interests—the more lenient treatment of others belies the claim. As this Court explained in *American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 312 (1965), "where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced."

Nor have the NLRA cases declined to apply these principles where the particular employee misconduct consisted of criminal activity against the employer. Of course an employer may discipline employees for such misconduct, and the employees may be prosecuted by the State as well. But the NLRA is not an instrument of the criminal laws, and its principles do not bend out of shape because conduct amounts to a crime under State law.[34] Thus, if an employer seizes upon an employee's criminal conduct as a pretext to inflict an injury in fact motivated by the employee's union allegiance, Section 8(a)(3) is violated.

The reference in the opinion below to *Nix* v. *NLRB*, 418 F.2d 1001 (5th Cir. 1969), appears to suggest that the Fifth Circuit has, in a case arising under the NLRA, taken a view of the scope of § 8(a)(3) contrary to that just stated. In *Nix*, as here, the employee had engaged in theft against the employer, and the Fifth Circuit there declared that the theft "furnished ample grounds for discharge." *Id.* at 1006. But the court recognized in *Nix* that there remained an issue as to "whether or not the reason assigned for discharge was pretextual, i.e., that the real motive for Nix's discharge was his activities with the [union]." *Ibid.* The court sustained the discharge only because it found that the discharge was indeed for theft, and not pretextual. *Id.* at 1006-08.

The Fifth Circuit captured the essence of the NLRA law in *NLRB* v. *Finesilver Mfg. Co.*, 400 F.2d 644 (5th Cir. 1968). There three employees were involved in a fight. The two pro-union employees were fired; the one non-union employee was not. The court recognized, of course, that em-

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[34] See, e.g., *Steelworkers* v. *Labor Board*, 376 U.S. 492, 501-502 (1964); *Labor Board* v. *Rice Milling Co.*, 341 U.S. 665, 672 (1951).

ployers may fire employees for fighting. But on the facts of the case, the court reasoned:

> "[T]he fight cannot withstand scrutiny as a reason for discharging [the two pro-union employees] because Gonzalez, who was friendly to management, was not fired. Since Gonzalez was not fired, it can reasonably be inferred that Palacios and Fabian would not have been treated differently but for their known allegiance to the union." *Id.* at 647.

In sum, an employer who has treated criminal conduct less severely when engaged in by non-union employees cannot be heard to say that he does not want "criminals" working for him: he has shown, by his retention of non-union "criminals," that his plea is false.

For like reasons, an employer violates Title VII if, *because of race*, he visits more severe discipline upon employees of one race who engage in criminal misconduct than upon those of another race who are equally culpable. That principle does no violence to the employer's legitimate interests, but rather reflects his own evaluation of those interests. Since the employer has not deemed the misconduct sufficient to merit discharge when engaged in by employees of one race, he may not be heard to assert "business justification" as a shield for his racial discrimination.

Of course, in the instant case it remains for petitioners to prove their allegations. They have alleged, but have yet to prove, that in fact there was disparate treatment (i.e., that the black employee was indeed "equally culpable"), and that such disparate treatment was visited because of race, and not for other reasons.[35] But petitioners' allega-

[35] For example, an employer might show that although all em-

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tions state a claim of violation of Title VII, and the court below erred in holding otherwise.

CONCLUSION

For the reasons set forth hereinabove, the decision below should be reversed.

Respectfully submitted,

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ployees were equally culpable, their prior work records were greatly different and thus warranted mitigation in the case of one employee but not in the case of others.